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HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr.M.P. No. 227/2007

Applicant — Sharmendra Maheshwari

Versus

Non-applicants — Pramod Kedia and another

POST FOR ORDER ON 13-11-2007

Sd/-
L.C. Bhadoo
Judge

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HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr.M.P. No. 227/2007

Applicant		Sharmendra Maheshwari, S/o Roopkishore Maheshwari, aged about 60 years, R/o Mannu Chowk, Tikrapara (CG)
	Versus	
Non-applicants	1.	Pramod Kedia, son of Chunnilal Kedia, R/o Ground Floor, Maruti Building, Bus Stand, Bilaspur (CG)
	2.	Giriraj Maheshwari, Proprietor, M/s Balaji Oil Industries, S/o. Sharmendra Maheshwari, aged about 35 years, R/o Mannu Chowk, Tikrapara, CG.

Present:

Mr. A.V. Shridhar, Advocate for the applicant.

Mr. Ravindra Agrawal, Advocate for the respondent No. 1.

None for the applicant No. 2.

ORDER
(Delivered on 13 /11/2007)

Dhirendra Mishra, J

The applicant by this petition, under Section 482 of Cr.P.C. has prayed for quashing of the Criminal Complaint no. 194/2007 against him pending in the Court of Additional Chief Judicial Magistrate, Bilaspur.

2. Briefly stated the facts necessary for this petition are that the complainant/applicant No. 1 filed a complaint against the present applicant and non-applicant No. 2 with the averments that the accused No. 1 is proprietor of M/s Balaji Oil Industries, Bilaspur and he was appointed dealer of Nokia Mobiles by the complainant whereas the accused No. 2 is authorized person of M/s Balaji Oil Industries and both the accused persons are engaged in the business of selling of mobile and they are father and son. Two cheques of ICICI Bank, Branch Surat of Rs. 75,352/- dated 28-10-2006 and Rs. 75,352/- dated 27-10-2006 were drawn by the accused No. 1 towards price of Mobiles supplied to them. The same were

deposited by the complainant, however, it was returned by the bankers of the accused No. 1 because of insufficient fund in the account of accused no. 1. On the request of the accused No. 1, the cheque was again deposited on 1-12-2006, however the same was again dishonored on the same ground. Even after notice, the accused persons did not pay the amount against the cheques and thus the accused persons committed offence which is punishable under Section 138 of Negotiable Instruments Act (For short hereinafter referred to as the Act) and Section 420 of Indian Penal Code. The trial Court took cognizance of the offence against both the accused under Sections 138 of the Act and directed issuance of summons vide order dated 7.2.2007.

3. The applicant/accused No. 2 preferred a criminal revision No. 65/2007 before the 3rd Additional Sessions Judge, Bilaspur against the order of issuance of summons, however the same was rejected with an observation that the remedy available to the applicant accused was to move an application under Section 482 of Cr.P.C. and criminal revision under Section 397(2) of Cr.P.C. is not maintainable.

4. Learned counsel for the applicant submits that the cheques were drawn by the accused No. 1- the proprietor of M/s Balaji Oil Industries. Neither the account on which the cheques were drawn is in the name of the present applicant nor he is signatory of the instrument. Referring to Section 138 of the Negotiable Instrument Act, it was argued that from the allegations present in the complaint, it is evident that accused Giriraj Maheshwari is proprietor of M/s Balaji Oil Industries and the cheques were issued by him and the Bank account is also in his name and, therefore, proprietary concern does not come within the definition of a company as per Section 141 of the Act. Reliance is placed in the matter of **Raghu Lakshminarayanan -v- M/s Fine Tubes**[1] and **Dr. V. Bala Raju -v- M/s. Pashak Feeds Pvt. Ltd and another**[2].

5. On the other hand, learned counsel for the Non-applicant No. 1/complainant argued that there are allegations in the complaint that both the accused persons trade in Mobile and

[1] 2007(53) AIC 1 (SC)
[2] 2005 Cri.L.J. 1129

they are father and son. They had business transactions with the complainant and mobile sets were supplied to both of them. The applicant was fully aware of the fact at the time of issuance of cheques sufficient fund was not available in the account of his son Giriraj Maheshwari. There is averment that the applicant was in-charge of and responsible for the conduct of the business of the company at the time of offence, and therefore, the trial Court has rightly taken cognizance against him also. Reliance is placed in the matter of **S.M.S. Pharmaceuticals Ltd. –v- Neeta Bhalla and another**[3] and **N. Rangachari –v- Bharat Sanchar Nigam Limited**[4].

6. The only question to be decided in this petition is where cheque drawn by proprietor of a propriety concern is dishonored on the ground of insufficient fund, whether cognizance of offence under the Negotiable Instruments Act can be taken against an individual who is neither the signatory of the instrument nor a partner of the said firm simply on the allegation that he was also actively involved in the transaction of proprietary concern?

7. In the matter of **Raghu Lakshminarayanan**[1] a complaint under Section 138 of the Act was filed with the allegations that the respondent No. 1 – accused is a business concern whereas respondent no. 2 to 6 were described as in-charge Managers, Directors and Partners as they had been dealing with the complainant by representing themselves to be so responsible for the dealings and day to day working of the accused business concern. The Chief Metropolitan Magistrate issued summons against all the accused persons. The application filed by accused No. 3 under Section 482 of Cr.P.C. was dismissed by the High Court whereupon the Special Leave Petition was filed by the accused No. 3 for quashing the complaint against him on the ground that the accused business concern was a proprietary concern of the accused No. 2 and he was merely an employee of the firm. The Hon'ble Supreme Court dealing with Section 141 of the Act has held that the concept of vicarious liability was introduced in penal statutes like Negotiable

[3] 2005 Cri.L.J. 4140
[4] 2007 Cri.L.J. 2448

Instruments Act to make the Directors, partners or other persons, in charge of and in control of the business of the Company or otherwise responsible for its affairs; the Company itself being a juristic person. A juristic person can be a company within the meaning of the provisions of the Companies Act, 1956 or a partnership firm within the meaning of the provisions of the Indian Partnership Act, 1932 or an association of persons which ordinarily would mean a body of persons which is not incorporated under any statue. A proprietary concern, however stands absolutely on a different footing. A person may carry on business in the name of a business concern, but he being proprietor thereof, would be solely responsible for conduct of its affairs. A proprietary concern is not a Company. The Company in terms of the explanation appended to Section 141 of the Negotiable Instruments Act, means any body-corporate and includes a firm or other association of individuals. Further dealing with the distinction between the partnership firm and proprietary concern, it has been held that 'it is trite that a proprietary concern would not answer the description of either a company incorporated under the Indian Companies Act or a firm within the meaning of the provisions of the Section 4 of the Indian Partnership Act and accordingly the Supreme Court allowed the appeal and complaint against the appellant was quashed.

8. Identical question cropped up before the High Court of Andhra Pradesh in the matter of **Dr. V. Bala Raju**[2] and it has been held in para 5 thus:-

> *"5. Though the heading of Section 141 of the Act reads 'offences by companies', as per the explanation to that Section "Company" means "any body corporate and includes a firm or other association of individuals; and "director" in relation to a firm, means a partner in the firm." Therefore, by virtue of the explanation to Section 141 of the Act theory of vicarious liability is also extended to body corporate firms and associations of individuals only but not to sole proprietary concern. Since Kousalya Enterprises, admittedly, is a proprietary concern, it cannot be said to be a Company, or a firm or a body corporate or*

an association of individuals, for to first respondent to invoke Section 141 of the Act to make the petitioner also liable on the ground that he is managing its affairs. It is well known that penal statute has to be strictly construed, and it is also well known while construing a Section no word can be added to or deleted from that Section. So by invoking Section 141 of the Act a person who is not either the drawer of the dishonoured cheques, or the proprietor but is in charge of the day to day affairs of a sole proprietary concern, cannot be made liable for an offence under Section 138 of the Act."

9. In the matter of **N. Rangachari**[4], complainant Bharat Sanchar Nigam Limited filed a complaint against Datta Access (India) Limited and two others showing that they are the directors with an averment that they were in-charge and responsible to the accused No. 1 for conduct of business of accused No. 1 company. Considering the allegations present in the complaint, the petition of accused No. 1 for quashing the proceedings against him was rejected with an observation that the question whether they were in-charge of the company at the time of offence or not can be adjudged during trial. In this matter, undisputedly the accused company was the company incorporated under the Indian Companies Act, 1956 and there were allegations that the petitioners were Directors of the Company and responsible for the business of the Company at the relevant time.

10. Similarly, in the matter of **S.M.S. Pharmaceuticals Ltd.** [3] also, a company incorporated under the Indian Companies Act was prosecuted for the offence under Negotiable Instruments Act with the averments that the accused at the time of offence was in-charge and responsible for the conduct of the business of the Company.

11. However in the instant case, it is evident that the accused drawing cheques is a proprietary concern and accused No. 1 is its proprietor. The applicant is in no way connected with the firm either as partner or as signatory of the cheques. A person may carry on business in the name of a business concern, but

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he being proprietor thereof would be solely responsible for conduct of its affairs. A proprietary concern is not a Company. In the aforesaid circumstances, the trial Court can take cognizance only against the accused No. 1 Giriraj Maheshwari and issuance of process against the applicant is an abuse of process of Court and the same cannot be sustained.

12. In the result, the petition is allowed. The impugned order is set aside and the order dated 7.2.2007, passed in complaint case No. 194/2007 directing issuance of summons against the applicant/accused No. 2 is hereby quashed.

Sd/-
L.C. Bhadoo
Judge

Pathak/-